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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC.,
Petitioner,

v.

OLLIE T. HILL, *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Western Electric Company, Inc., hereby replies to the brief of Respondents, submitted October 7, 1982, and argues in support of the Petition for a Writ of Certiorari filed in this case.

I. TWO RECENT DECISIONS BY THIS COURT HIGHLIGHT THE CONFLICT BETWEEN THE DECISION BELOW AND *EAST TEXAS MOTOR FREIGHT SYSTEM, INC. v. RODRIGUEZ* AND *GENERAL TELEPHONE CO. OF THE SOUTHWEST v. FALCON.*

Nothing in Respondents' brief alters or casts doubt upon the most important reason that this Court should grant the writ: the inconsistency between the decision below and this Court's holdings in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) and, most critically, last term's decision in *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982). *See* Petition for a Writ of Certiorari (herein-

after "Petition"), at 6-11. Indeed, the conflict between the decision below and *Rodriguez* and *Falcon* has become even clearer since the petition for a writ of certiorari was filed.

On October 4, 1982, this Court vacated and remanded two cases, *University of Houston v. Wilkins*[1] and *County of Los Angeles v. Jordan*,[2] for reconsideration in light of *Falcon*. Both of these cases, like the Fourth Circuit's decision in *Brown v. Eckerd Drugs, Inc.*,[3] which also was vacated for reconsideration in light of *Falcon*, involved overbroad class representation by plaintiffs who were never class members, and whose claims were neither typical of, nor shared a common question of law or fact with, the claims of the class. These cases confirm that the requirements of Rule 23 are not "technical" or "formal," but are critical to the conduct of class litigation. Moreover, in *Wilkins*, as in *Brown*, the success of the named plaintiffs on the merits of claims they had no standing to litigate did not prevent this Court from overturning the judgment for failure to comply with the provisions of Rule 23.[4]

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[1] 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982) (No. 81-1653), *vacating and remanding*, 654 F.2d 388 (5th Cir. 1981). *Wilkins* was also remanded for reconsideration in light of *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982).

[2] 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982), (No. 81-2189), *vacating and remanding*, 669 F.2d 1311 (9th Cir. 1982).

[3] 102 S. Ct. 2952 (1982), *vacating and remanding*, 663 F.2d 1268 (4th Cir. 1981). Since this Court's vacation of *Brown*, the Fourth Circuit has itself vacated and remanded that case to the district court, where new named plaintiffs have now moved to intervene based upon the decision in the instant case. No. 79-1821 (4th Cir. Aug. 31, 1982). This eventuality was anticipated in Western's Petition, at 11, note 14, and illustrates that the majority opinion below renders the requirements of Rule 23, as put by Judge Russell dissenting in *Brown*, "just a jumble of words stated in hypocritical mandatory terms." 633 F.2d at 1297.

[4] In *Wilkins* the appellate court found proof of discriminatory treatment of a sub-class of female professional and administrative

These cases, along with *Falcon* and *Rodriguez*, evidence this Court's determination that the requirements of Rule 23 are vitally important, and must be applied strictly in employment discrimination litigation. These cases stand in marked contrast to the decision below, where the Fourth Circuit simply ignored the inability of the named plaintiffs to satisfy three central requirements of Rule 23 (membership in the class, presentation of common questions of law or fact and presentation of typical claims) and held that failure to satisfy the prerequisites of Rule 23 created unimportant "formal" or "technical" defects. This error led to the central flaw in the decision below: that the presentation of claims of hiring discrimination by named plaintiffs who had not suffered discrimination in hiring created only a "technical" inadequacy of representation that was cured by the named plaintiffs' success on the merits.[5]

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staff members, who were not properly part of the class encompassed within the claims of the named plaintiffs. As with this Court's ruling in *Brown*, success on the merits of these improperly entertained claims did not excuse the named plaintiffs' failure to satisfy the requirements of Rule 23, and did not prevent this Court from vacating the judgment below. The decision of the Fourth Circuit in the instant case, allowing reinstatement of findings that were properly vacated because they were procured in derogation of Rule 23, is fundamentally at odds with these recent decisions by this Court.

[5] Respondents' claim that the Fourth Circuit did not so hold (Brief in Opposition, at 18) is mistaken. The majority below spent most of its opinion discussing the possibility of reinstatement, and throughout the discussion characterized the sole defect in the original trial as one of "inadequate representation." *See* Appendix to Petition, at 10a-12a, 15a-16a. Indeed, the majority below thought this such a critical point that it expressly instructed the lower court, in reconsidering the intervention motion, that the opinion in *Hill I* was based only upon this "technical" problem which was cured by success on the merits:

> Next, the court should take into account that this court's determination of inadequacy of representation on the first appeal was based entirely upon the formal lack of sufficient identity of interests between any class representatives and the non-hired

Respondents have neither addressed this flaw, nor the clear conflict between the decision below and cases in other circuits (Petition at 11-13),[4] nor the unresolved conflict within the Fourth Circuit as to the impact of Rule 23 upon employment discrimination litigation (Petition at 13-14). In this connection, Western would call this Court's attention to the Fourth Circuit's treatment of the *Brown* case on remand from this Court. The Fourth Circuit has merely vacated and remanded the case to the district court, where new named plaintiffs, relying on the opinion in this case, have now sought to intervene. The intra-circuit conflict noted by Western (Petition, at 13-15) thus continues, and the majority opinion in this case has provided a transparent method for dissatisfied plaintiffs to eviscerate the requirements of Rule 23 enunciated by this Court.

Rather than address these issues, Respondents have contented themselves with arguing that should intervention be allowed, the district court will be obliged to conduct a new class certification hearing wherein the strictures of *Falcon* and *Rodriguez* will be observed. (Brief in Opposition, at 9-10). A second hearing, however, cannot possibly justify reinstatement of findings that were procured in plain violation of the provisions of Rule 23 and Article III of the Constitution, and were void *ab initio*. The entry of new named plaintiffs representing a new

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members of the class. *See Hill v. Western Electric Co.*, 596 F.2d at 101-02. We did not then address the question of the actual effectiveness of the representation notwithstanding its formal inadequacy. When actual effectiveness is explored as a matter of first instance inquiry, it is obvious that the representation actually provided had all the indicia of diligence and practical effectiveness, including most notably that it yielded a favorable result on these class members' claims.

Appendix to Petition, 15a-16a (footnote omitted).

[4] Since the filing of the petition in this case, there have been petitions for a writ of certiorari filed in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), a case diametrically opposed to the decision below. *See* Petition, at 11-12.

class of rejected applicants, some six years after trial, cannot excuse the fact that the original trial of hiring discrimination claims was conducted without regard for the requirements of Rule 23. A new certification hearing cannot possibly alter the fundamental error in the decision below, which was that presentation of hiring claims by named plaintiffs who could not satisfy Rule 23's requirements with respect to a class of rejected applicants created only a "technical" or "formal" defect. The petition should be granted in order to rectify this fundamental Rule 23 and Article III jurisdictional error, and the possibility of a new class certification hearing in no way addresses the issue raised herein.

II. RESPONDENTS' EFFORTS TO REMEDY THE DEFECTS IN THIS CASE THROUGH INTERVENTION AND A NEW CLASS CERTIFICATION HEARING CANNOT BE COUNTENANCED.

The class certification hearing in this case was held in 1975. The certification decision was reviewed and revised by the Fourth Circuit in 1979, and this Court denied review of that decision.[7] This sequence confined the litigation to the claims that the original named plaintiffs had standing to present, and excluded claims of discrimination in hiring from this case. Now, nearly seven years after the initial certification hearing, the Fourth Circuit has provided Respondents with the opportunity for another certification hearing during which the issue of the scope of the litigation, decided long ago in a fashion plainly consistent with *Falcon* and *Rodriguez*, will be revisited. In their brief, Respondents claim that this bizarre result is not only proper, but will remedy the flaws in the original trial so as to allow reinstatement of previously vacated findings.

This argument is apparently based on Respondents' claim that the original certification decision, which was overturned on appeal in 1979, was somehow correct at the

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[7] Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

time it was made (Brief in Opposition, at 17). This assertion has absolutely no substance. In the first *Hill* opinion, the Fourth Circuit held:

> Because no named plaintiff is a member of the excluded classes, we think the district court *improperly considered* the discrimination in hiring claims and the claim of discrimination against women in promotions in the Installation facility.
>
> • • •
>
> The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring. Under *Rodriguez*, certification of a class including victims of alleged hiring discrimination who never were employed by Western Electric *was in error*.

596 F.2d at 101-02 (emphasis added). The court thus did not hold that the original certification proceeding was correct, but that the district court's certification ruling was "in error" and the hiring claims were "improperly considered" at the time of trial.[8] Moreover, even the majority opinion below acknowledged that the initial proceeding was flawed, but concluded that these flaws were unimportant "technical" and "formal" matters. Had the majority below believed that the original trial properly included hiring claims, it could well have said so. Respondents' claim is simply an unsupported *post hoc* rationalization designed to justify an otherwise untenable position.

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[8] Respondents attempt to argue that the Fourth Circuit held that *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) "arguably" authorized the original certification decision. Brief in Opposition at 3. In point of fact, the Fourth Circuit criticized the lower court's reliance upon *Barnett*, pointing out that *Barnett* was a limited opinion in which the named plaintiff had been allowed to represent only those persons seeking the same position that he sought. 596 F.2d at 101.

In similar fashion, Respondents' claim that this Court's decision in *Rodriguez* created a startling change in the law which justifies additional class certification proceedings is simply unfounded. The language of Rule 23 has remained unchanged since 1966, and surely this Court's ruling in *Rodriguez* that a named plaintiff must suffer the same injury and possess the same interest as class members is nothing new.[9] This Court's decision in *Rodriguez* was thus not a revelation or a change in direction, but a confirmation of existing law that the lower courts should have, and often did, apply in employment discrimination litigation.[10] *Rodriguez* represents the law that should have been applied initially in this case, not a new mysterious doctrine that took Respondents unaware.[11]

Finally, Respondents attempt to justify revisiting the class certification issues in this case by relying on several single litigant "real-party-in-interest" cases, such as *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Eklund*

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[9] Indeed, in *Rodriguez* this Court cited a substantial number of cases, as far back as *Bailey v. Patterson*, 369 U.S. 31 (1962), for this elementary proposition.

[10] Throughout this litigation, and most critically in the initial class certification, Petitioner opposed the named plaintiffs' attempt to represent rejected applicants because none of the named plaintiffs had been the victim of discrimination in hiring. Indeed, in the initial certification decision in this case, the district court refused to allow representation of rejected applicants on this very basis only to reverse itself *sua sponte* a short time later. Petition, at 2. Respondents' claim that *Rodriguez* was a revelation justifying new proceedings is thus disingenuous.

[11] Respondents' purported distinction of *City & County of Denver v. Matsch*, 635 F.2d 804 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981) is thus without substance. The court there denied litigants who had failed to establish standing a second chance to do so in order to "save" a judgment on the merits, a course the Fourth Circuit should have followed in this case. *See* Petition, at 23-24.

v. Mora, 410 F.2d 731 (5th Cir. 1969).[12] These cases dealt solely with corresponding technical omissions in pleadings regarding single parties raising single claims, and involved situations where the proper party to the litigation was never before the court. By contrast, in this case proper parties—that is, the original named plaintiffs—were always before the court, and it was the scope of the claims that those parties could raise that was at issue under Rule 23. As *Falcon* makes clear, Rule 23's requirements are used to determine the scope and character of class litigation, based upon the injuries allegedly suffered by the named plaintiffs and the claims they have standing to raise. Class claims not "fairly encompassed within the named plaintiffs' claims,"[13] such as the hiring discrimination claims in this case, fall outside the scope of litigation sanctioned under both Rule 23 and Article III. The instant case thus does not involve one litigant merely stepping into the shoes of another, but one party stepping beyond the shoes of another to expand drastically the proper scope of the litigation. This is in no sense analogous to the "real-party-in-interest" cases that Respondents rely upon.

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[12] *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954), also relied upon by both the majority below and the Respondents in their brief, simply does not address the issue raised in this case. *Finn* rests upon an ancient rule of pleading related solely to diversity cases, and merely holds that where the indispensable parties to the litigation are truly diverse, elimination of a dispensable party to create perfect diversity can be given retroactive effect. *Finn* thus was a case where the initial litigation was, but for the presence of an unnecessary party, properly conducted, a far cry from the present situation where it has been conclusively determined that the hiring claims were never properly before the court. Moreover, jurisdictional defects involving diversity do not involve important federal policies under Rule 23 nor Article III concerns. *See* Petition at 21-22, note 31.

[13] *General Tel. Co. of the Southwest v. Falcon*, 102 S. Ct. 2364, 2371 (1982) (*quoting General Tel. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)).

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE WHICH SHOULD NOW BE CONSIDERED BY THIS COURT.

The issues raised in this case, contrary to Respondents' claims, are of exceptional importance because they arise repeatedly in class actions in all substantive areas of law. Respondents' claim that the opinion below will not generate spurious class actions because the district courts can be expected to follow *Falcon* and *Rodriguez* (Brief in Opposition, at 20) is unfounded. District courts, even assuming they attempt to follow *Rodriguez* and *Falcon*, are constantly required to exercise their judgment under Rule 23 in defining the scope of the litigation.[14] The commands of Rule 23 are plainly not self-executing, but rather require the exercise of judgment based upon the facts presented to the court. Whenever it is determined that the district court has erred, construed the scope of the litigation too broadly, and allowed trial of claims that should not have been presented, the opinion below would allow intervention to save favorable findings by parties who would not be bound by an adverse determination on the merits. This situation will arise whenever an appellate court finds that a lower court certified an overly broad class, simply because certification orders are not immediately appealable. This is, as noted above, exactly what has happened in *Brown, supra.*

Finally, Respondents have argued that review by this Court is inappropriate because the Fourth Circuit has ordered additional proceedings in which the Respondents may not succeed. (Brief in Opposition, at 22-23). The possibility of further proceedings in the lower courts has not prevented this Court from correcting evident errors in similar cases. Indeed, in *Falcon*, the merits of the hiring and promotion claims remained to be decided at the time this Court issued its opinion. 102 S. Ct. at 2369.

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[14] An apt example of this process is seen in *University of Houston v. Wilkins, supra*, where the court was called upon to decide whether the claims of the named plaintiffs were typical of persons working in different administrative units, and in different job classifications.

Just as the possibility that the plaintiff in *Falcon* might not have prevailed on the merits was no bar to this Court's consideration of that case, the possibility that Respondents may not prevail below should not prevent this Court from considering this case. This petition challenges the Fourth Circuit's reliance upon the improper possibility of reinstatement of findings that were void *ab initio* as an excuse to overturn the lower court's denial of intervention. It is to this error, and the majority's misreading of Rule 23, that the petition is addressed. Whether Respondents succeed in obtaining reinstatement of the vacated findings does not remedy the majority's basic error, which is the source of all further proceedings in this litigation.

CONCLUSION

Petitioner respectfully renews its request that this Court grant its Petition for a Writ of Certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of *Falcon*.

Respectfully submitted,

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